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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

ELENA NACARINO, on behalf of herself
and all others similarly situated,

Plaintiff,

vs.

CHOBANI LLC,

Defendant.

Case No. 20-cv-7437-EMC (AGT)

**PLAINTIFF'S REPLY IN SUPPORT
OF MOTION FOR SANCTIONS**

Date: May 12, 2022

Time: 1:30 p.m.

Judge: Hon. Edward M. Chen

1 **REPLY MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiff Elena Nacarino (“Plaintiff”) respectfully submits the following reply in further
3 support of her motion for sanctions against Chobani LLC (“Defendant” or “Chobani”).

4 **INTRODUCTION**

5 This case is about the Product’s vanilla flavoring. This case has always been about the
6 Product’s vanilla flavoring since it was filed on October 23, 2020. ECF No. 1. However, Plaintiff
7 and the proposed class cannot prove her claim because of Defendant’s willful refusal to provide
8 meaningful responses to Plaintiff’s discovery requests about Defendant’s vanilla flavoring. Indeed,
9 Chobani still has not identified all the flavoring ingredients in its Product, claiming that only its
10 supplier of the “natural flavors” in the Product would know if the Product contains vanillin from
11 non-vanilla plant sources, as Plaintiff has long alleged. Chobani refuses to even identify the
12 supplier so that Plaintiff can begin the process of a third-party subpoena.

13 Chobani’s current excuse that the Parties have yet to agree on the ESI protocol, custodians
14 or search terms is just the latest in a long line of excuses that Chobani has used to justify its blatant
15 refusal to meet its discovery obligations. Chobani at first refused to respond to Plaintiff’s first set
16 of discovery requests, served on September 14, 2021, based on the pendency of its motion to
17 dismiss the Third Amended Class Action Complaint (“TAC”). When the motion was denied,
18 Chobani used its request for an extension of time to answer the TAC—to which Plaintiff readily
19 agreed as a matter of professional courtesy—to file a motion to certify for immediate appeal this
20 Court’s order and then pointed to the pendency of that motion as grounds for refusing to respond
21 to discovery requests. That too was rejected by Magistrate Judge Tse—at least with respect to
22 merits discovery, which comprised the vast majority of the first set of discovery requests. On
23 March 3, 2022, Judge Tse ordered Chobani to provide supplemental responses “in compliance
24 with the federal rules, by March 25.” ECF No. 67 (the “Discovery Order”). And when this Court
25 denied the certification for appeal, even the limited stay on discovery of restitution-related issues
26 was lifted. Chobani nonetheless has continued its strategy of delay. Chobani ignored Plaintiff’s
27 offer to meet and confer in advance of the deadline imposed by Judge Tse. Instead, on March 25,

Chobani provided only evasive responses to interrogatories and produced no documents in violation of federal rules and Judge Tse's Order.

Defendant concedes that the Parties have had **four** meet-and-confers (on October 14, 2021, February 28, 2022, March 29, 2022, and April 13, 2022) and exchanged numerous communications all about Plaintiff's first set of discovery requests. *See* Defendant's Opposition to Plaintiff's Motion for Sanctions ("Def. Opp.") at 2-6. Plaintiff already sought judicial intervention, resulting in the Discovery Order, and a second joint discovery letter is pending before the Magistrate Judge. ECF No. 79. Yet despite all of Plaintiff's efforts to obtain information from Defendant and even this pending motion for sanctions, Chobani still has not produced **any** information to allow "plaintiff and the proposed class . . . to start building their case." Discovery Order at 1:18. Given all this, Defendant's contention that it is Plaintiff who is "abus[ing] the discovery process," Def. Opp. at 2:12, is truly jaw-dropping. Chobani has proven what Plaintiff argued in its opening papers: "Chobani's tactics to obstruct and obfuscate know no bounds." *See* ECF 77, at 8:27.

ARGUMENT

I. MONETARY SANCTIONS SHOULD BE IMPOSED AGAINST DEFENDANT

A. This Motion Is Properly Before This Court

Chobani argues that this motion for sanctions is premature because "the parties had not yet meaningfully met and conferred regarding Chobani's Supplemental Responses before this motion was filed" Def. Opp. 6-7. Not true. Plaintiff has sought proper responses to her discovery requests for months, offered to meet and confer in advance of the March 25 deadline imposed by Judge Tse, and participated in multiple meet-and-confer sessions. Even after spending hours communicating verbally and in writing with Chobani's counsel and seeking judicial intervention, Plaintiff is no closer to getting her discovery requests answered than when her counsel started the process of compelling responses back in October 2021. This motion is hardly "premature."

1 This motion also is not “in disguise.” Def. Opp. at 8. This motion is a motion for sanctions,
 2 which must be brought separately before this Court. *See* Civil L.R. 7-8. The Parties have their
 3 second joint letter regarding discovery pending before Judge Tse. *See* ECF No. 79. Thus, this
 4 motion for sanctions is properly before this Court, and the discovery dispute is properly before the
 5 Magistrate Judge.

6 **B. Sanctions Should Be Imposed for Chobani’s Bad Faith Conduct**

7 Chobani’s actions speak for themselves. Even weeks after Chobani was court-ordered to
 8 supplement its responses and Chobani first claimed that only its supplier knows the ingredients
 9 that comprise the “natural flavors” in its Product—which was alleged by Plaintiff to contain
 10 vanillin not derived from the vanilla plant—Chobani still refuses to verify its interrogatory
 11 responses in accordance with Fed. R. Civ. P. 33(b)(5), and Chobani still refuses to identify its
 12 supplier of “natural flavors.” Chobani’s position is that it will not provide even this basic
 13 information until May 9, *see* ECF No. 79 at 4, even though Chobani presumably has known this
 14 information since the first set of discovery was served and when Chobani served its initial
 15 disclosures on October 19, 2021.¹ Even taking Chobani’s unverified response regarding its lack of
 16 knowledge about its own Product’s ingredients at face value, Plaintiff obviously cannot serve third
 17 party subpoenas without knowing whom to serve.

18 Chobani also makes much of the fact that it has “produced its first set of documents and is
 19 in the process of making additional rolling productions.” Def. Opp. at 1:8-10. To be clear, Chobani
 20 has produced a total of ten pages of documents, consisting of labels of the Products, many of which
 21 appear to be the same labels that were already publicly filed by Defendant in this case. *See*
 22 Declaration of Sue J. Nam (“Nam Decl.”), filed concurrently, at ¶ 3. As of the filing of this Reply,
 23 Chobani has produced no additional documents. *Id.* In other words, ten Product labels are the only
 24 documents that Defendant has produced since Plaintiff served its First Set of Requests for
 25 Production of Documents on September 14, 2021 and despite the Discovery Order specifically

26 _____
 27 ¹In its initial disclosure, Chobani identified only one Chobani employee as “[l]ikely to have
 28 knowledge regarding manufacturing of Greek Yogurt Vanilla Blended, including packaging,
 ingredients, labeling, and regulatory compliance.”

1 stating that “plaintiff and the proposed class should be allowed to start building their case” and
2 “Chobani must supplement its responses to these requests, in compliance with the federal rules, by
3 March 25.” Discovery Order at 1:18, 21-22.

4 Chobani’s excuse that “the parties have yet to agree on a proposed ESI Protocol, custodians
5 or search terms,” Def. Opp. at 2:7-8, is merely the latest in a long string of excuses for why it
6 cannot meet its discovery obligations. Indeed, Chobani raised for the first time the necessity of an
7 ESI Protocol, search terms, and custodians as prerequisite to its willingness to **begin searching**
8 for relevant and responsive documents four days **after** Judge Tse’s March 25 deadline. These
9 newest grounds have no bearing on Plaintiff’s first set of interrogatories. And even with respect to
10 Plaintiff’s requests for document production, the first time Chobani raised the topic was on March
11 29, 2022 at a meet-and-confer demanded by Plaintiff.

12 Simply put, Chobani has no justification in its delay in providing substantive responses to
13 Plaintiff’s first set of discovery requests, especially with respect to information that it currently
14 knows and has known for months, such as the identity of its supplier of the Product’s “natural
15 flavors.” Chobani is abusing the meet-and-confer process and acting in bad faith in violation of
16 the letter and spirit of the Discovery Order. Sanctions are wholly appropriate here.

17 **CONCLUSION**

18 Plaintiff respectfully requests that this Court award sanctions against Defendant in the form
19 of an award of Plaintiff’s attorneys’ fees associated with this motion and Defendant’s delay in
20 producing proper responses to Plaintiff’s first set of discovery requests, including Plaintiff’s prior
21 motion to compel that resulted in the Discovery Order, her efforts to enforce the Discovery Order,
22 the pending second joint discovery letter before Magistrate Judge Tse, and any future motion
23 practice.

Respectfully submitted,

Date: April 21, 2022

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By: /s/ Sue J. Nam

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